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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAURENCE L. GRABOWSKI, Plaintiff and Appellant, v. PATRICK F. GRABOWSKI, Defendant and Respondent.	G047296 (Super. Ct. No. 00CC14365) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Josephine Staton Tucker and John C. Gastelum, Judges. Dismissed.

Larry R. Marshall and J. Russell Tyler, Jr., for Plaintiff and Appellant.

Jeffer, Mangels, Butler & Mitchell, Stanley M. Gibson and Monica Q. Vu, for Defendant and Respondent.

Laurence L. Grabowski (Larry) appeals from a judgment in his action against his brother, Patrick F. Grabowski[1] entered after the trial court granted a motion under Code of Civil Procedure section 664.6[2] to enforce a global settlement of the litigation. Larry contends: (1) the settlement agreement was too uncertain to be enforced; (2) he lacked the mental capacity to form or understand the settlement agreement; and (3) the trial court erred by awarding Patrick attorney fees, accounting fees, and costs. Patrick has filed a motion to dismiss Larry's appeal as untimely. We agree the appeal is untimely and must be dismissed.

FACTS

This is the fifth appeal in the Grabowski family dispute that has been in litigation since 1996. The background of the break-up of the brothers' business relationship is explained in detail in *Grabowski v. Mustang Motels, Inc.* (Sept. 18, 2007, G036783) [nonpub. opn.] (*Grabowski I*) and *Grabowski v. Pine Tree Industrial Corporation, et al.* (Jan. 10, 2010, G040849) [nonpub. opn.] (*Grabowski II*).[3] We need not discuss the dispute in detail here. Suffice it to say that for virtually their entire lives, the brothers were involved in business and real estate ventures together and their families' financial affairs were intertwined. For unknown reasons, their relationship soured, Larry demanded an accounting, and this litigation began.

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[1] We hereafter refer to the parties by their first names for ease of reading and to avoid confusion, and not out of disrespect. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[3] The two other appeals, *Rutan & Tucker v. Grabowski* (Feb. 24, 2012, G044964) [nonpub. opn.] and *Grabowski v. Rutan & Tucker* (Feb. 24, 2012, G044438) [nonpub. opn.], concerned efforts by one of Larry's former attorneys to recover unpaid attorney fees.

Larry's record on appeal contains none of the pleadings, but from our prior opinions we know his complaint included causes of action against Patrick, Patrick's wife and four adult children, and at least three corporate litigants: Pine Tree Industrial Corporation (Pine Tree), La Paz Petroleum, Inc. (La Paz), and Mustang Motels, Inc. (Mustang). Some of the defendants filed cross-complaints against Larry. In *Grabowski I, supra*, G036783, we affirmed a judgment finding Larry had no ownership interest in Mustang. *Grabowski II, supra*, G040849, concerned judgments entered following a bench trial and the global settlement that is the subject of this appeal. Accordingly, we discuss that appeal in more detail.

Grabowski II

A bench trial on Larry's complaint and the cross-complaints took place in 2007 before Judge H. Warren Siegel. The day after both sides had rested, and before hearing final motions and closing argument, counsel announced a global settlement had been reached. Larry's counsel recited the settlement terms on the record before the court as follows:

"'[Larry's counsel]: The first term is the amount of $2.4 million will be paid to [Larry] . . . at the rate of $10,000 per month or more starting February 1st or such later date as [Larry] designates in 2008. [¶] The amount will be fully secured. The parties will cooperate in having all payments and transfers characterized as long-term capital gains. [¶] With respect to the payments on the $2.4 million, the parties are in agreement that there will be no interest component in the $10,000 payments. The parties will also cooperate in allocating the payments to depreciation provided there's no adverse impact on [the] long-term capital gains aspect of it. [¶] In addition, $400,000 will be paid to [Larry] within 30 days and within 30 days the Edna Property[4] will be conveyed to [Larry] free of liens and encumbrances with title insurance and taxes prorated. [¶]

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4 The Edna Property was alleged in Larry's complaint to be one of the properties Patrick acquired with joint venture funds.

[Patrick] will warrant that tax returns information provided to Larry by [Patrick's accountant] in 1996 is accurate and will cooperate and make available information that supports that tax return information. [¶] The parties . . . will exchange mutual general releases of known and unknown claims . . . . [¶] . . . There will be dismissals with prejudice of this litigation with the court retaining jurisdiction pursuant to [Code of Civil Procedure] section 664.6 to enforce the provisions. [¶] The facts of the settlement and the terms of the settlement will be confidential subject only to being provided to accountants for the purposes of tax returns. Attorney[] fees will be awarded to [the] prevailing party in the event of a breach. [¶] [Larry] will execute the documents necessary to confirm [100] percent ownership of the properties in Patrick's name and Patrick will hold Larry harmless on all liabilities related to those properties. [¶] [Pine Tree] stock will be quit claimed—whatever interest Larry has in [Pine Tree] stock will be quit claimed to Patrick or however Patrick chooses to have it quit claimed. [¶] The parties will execute such other documents as necessary to accomplish the objectives of the agreement. Larry will release all or withdraw all lis pendens that have been filed or recorded in connection with this litigation. [¶] The parties will enter into a long-term agreement which will contain the details of this agreement as well as such standard provision[s] as are customary in a transaction such as this. [¶] Parties will bear their own attorney[] fees and costs. The parties will warranty that there's been no assignment of claims that any of the releasing parties have ever had against the released parties. And Larry . . . will hold harmless the defendants against any claims based on any liens [Larry's prior lawyers] may have in settlement proceeds. And I think that's it.'" (*Grabowski II, supra,* G040849, at pp. 4-6.)

"After Larry's counsel finished putting the settlement terms on the record, the court inquired, 'Is there anything specific on La Paz . . . ?' Larry's counsel replied, 'Dismissal with prejudice; that's all.' The court asked each attorney if the recitation comported with their understanding of the settlement; all said it did. The court then had

the attorneys question each of their clients regarding the settlement agreement. Larry's counsel specifically confirmed with Larry on the record he heard the terms of the settlement his attorney had stated on the record, he understood the terms, he agreed to the terms, and he had no questions about the agreement." (*Grabowski II, supra,* G040849, at p. 6.)

"The court next clarified a point regarding the agreement to cooperate with long-term capital gains characterization, observing '[i]t's a cooperation clause. And if the [Internal Revenue Service] takes a different position, everybody has agreed to . . . .' Counsel stated they agreed with the court's assessment. The court specifically asked Larry, 'Do you understand that?' Larry said he did and he agreed." (*Grabowski II, supra,* G040849, at p. 6.)

"The court then commented, 'In other words, if all this gets done -- we're on the record. What's on the record is binding. Haven't had a chance to do a detailed written agreement, but what's on the record is binding. [¶] So if it all goes, I mean that ends the matter; it's a total resolution. Nobody can come back for any more. It's a done deal. [¶] Everybody understand that? Pat[rick] and Janis answered yes. And [Larry]?' Larry again replied, 'Yes.'" (*Grabowski II, supra,* G040849, at p. 6.)

"The court asked a few more questions about the confidentiality provision and indicated it would set an order to show cause (OSC) hearing 'in a month or so to ensure that everything does get done. [¶] Are there going to be dismissals with prejudice filed at the end of that month or what?' Larry's counsel stated he anticipated there would be, and the court asked how it would supervise the settlement once the dismissals were filed. Larry's counsel replied the court was to retain jurisdiction under section 664.6, and if problems arose, the settlement would be enforced by noticed motion under that section. The hearing concluded with the court setting an OSC regarding dismissal for December 3, 2007." (*Grabowski II, supra,* G040849, at pp. 6-7.)

In February 2008, Patrick and other defendants filed a motion to enforce the settlement agreement, explaining that in negotiating a final written settlement agreement, Larry attempted to add new terms. Larry opposed the motion, asserting the oral agreement was too indefinite to be fairly enforced because although the agreement required the $2.4 million obligation to be fully secured, the form of security had not been specified and Larry was not provided with a default remedy (e.g., acceleration of the debt). (*Grabowski II, supra,* G040849, at p. 7.)

At a hearing on the motion to enforce, the trial judge observed the global settlement had been "'pretty definitive when we put it on the record'" but he did not want to "'waste [his] time'" with conducting a hearing on, and deciding, the enforceability of the settlement. "'We will finish the trial, and I will make my decision.'" (*Grabowski II, supra,* G040849, at pp. 7-8.) Five months later, the court entered three judgments: final judgments concerning La Paz and Pine Tree, and an interim judgment against Patrick on some of Larry's accounting causes of action, ordering all joint ventures between Larry and Patrick dissolved and ordering an accounting.

Pine Tree and La Paz appealed. We agreed with their argument the trial court had abused its discretion by refusing to hear and decide the motion to enforce the global settlement agreement. (*Grabowski II, supra,* G040849, at p. 11.) We reversed the judgments and remanded to the trial court to conduct a hearing and decide the motion to enforce. (*Id.* at p. 12.)

Proceedings on Remand—the Current Appeal

While the *Grabowski II* appeal was pending, the underlying litigation was reassigned to Judge Josephine Staton Tucker, in particular with regard to the accounting by Patrick that Judge Siegel had ordered. The trial court denied Patrick's motion to stay the accounting pending completion of the appeal.

After we filed our opinion in *Grabowski II*, Patrick and the other defendants filed a new motion to enforce the October 23, 2007, global settlement

agreement. By that time, Patrick's accounting fees exceeded $600,000. Larry did not timely file any opposition to the motion and then attempted to late file an opposition that failed to comply with court rules. The trial court rejected Larry's request to continue the hearing, and noted that even if it considered Larry's late opposition, it would not have changed its ruling. Larry's late opposition is not in the record on this appeal.

On April 20, 2010, the trial court granted the motion to enforce the global settlement agreement and directed Patrick's counsel to prepare a judgment containing the terms of the oral settlement that had been placed on the record. The trial court denied Patrick's request that he be allowed to deduct his attorney fees and accounting costs from the settlement because he had not demonstrated a breach of the settlement agreement and had not presented evidence establishing the amount.

Larry filed a motion for reconsideration under section 1008, contending there were new facts regarding Larry's ability to understand the settlement agreement. The motion was accompanied by a declaration from a psychologist, Arnold Purisch. Purisch had examined Larry in 1998 and concluded at the time he suffered from Attention Deficit Hyperactivity Disorder (ADHD). Purisch retested Larry in March 2010, and concluded he still suffered from ADHD. Purisch believed Larry had difficulty focusing and suffered from impaired judgment that would have prevented him from understanding the settlement terms. The matter was reassigned to Judge John C. Gastelum, who heard and denied the motion for reconsideration on July 26, 2010.

For the next year, the parties wrangled over motions filed by Patrick regarding his request for an award of attorney fees and accounting costs incurred as a result of Larry's refusal to perform the settlement agreement A final judgment had not yet been entered. After those matters were resolved (largely in Patrick's favor) on October 25, 2011, the trial court entered a final judgment (hereafter the October 2011 judgment).

The October 2011 judgment contained the following relevant provisions requiring payments from Patrick to Larry, subject to offsets and judgment liens held by Hemming Morse, Inc. (the firm that conducted the accounting) and Rutan & Tucker (Larry's former attorneys) as follows:

Paragraph (1) provided: "(a) Subject to the offset and payment provisions below, [Larry] will be paid the amount of $2.4 million, with no interest accruing at any time, to be paid $10,000 per month, commencing the month after the amounts set forth herein are paid and/or deducted in full, upon the following terms: [¶] (i) The $10,000 payments shall be fully secured pursuant to a Memorandum of Security; [¶] (ii) The parties will cooperate in having all payments and transfers characterized as long-term capital gains; [¶] (iii) The parties will cooperate in allocating the payments to depreciation provided there is no adverse impact on long-term capital gains; [¶] (b) The Edna Property will be conveyed to [Larry] free of liens and encumbrances with title insurance and taxes prorated and [Larry] shall sell the Edna Property to satisfy any liens and any amounts owing to Hemming Morse. [¶] (c) The payment of $400,000 to [Larry] shall be offset as stated below[.]"

Paragraph (2) declared Patrick was the prevailing party for purposes of attorney fees and costs, awarding him $378,020 in attorney fees, an amount which would be offset against the $400,000 lump sum payment he was to make to Larry, leaving a balance owed to Larry of $21,979.99. The amount of costs awarded was left blank, but was to be deducted from the $10,000 monthly payments Patrick was required to make to Larry.

Paragraph (3) dealt with payment of Hemming Morse's fees. Paragraph 3(a) explained, "The [c]ourt has awarded Hemming Morse their remaining fees as [the] court-appointed expert in the amount of $447,245.76, inclusive of interest. If the Edna Property sale does not satisfy the amount owing, then [¶] (i) Patrick may use the balance of $21,979.99 owed to [Larry] to pay Hemming Morse's fees; (ii) Patrick

shall be entitled to deduct the remaining amount, if any, owed to Hemming Morse from the $10,000 per month payment set forth . . . above; [¶] (b) Patrick shall further be entitled to recoup the $375,209.01 he already advanced toward Hemming Morse's fees from the $10,000 per month payment set forth . . . above."

Paragraph (5) required Larry to execute documents confirming that properties held in Patrick's name were owned by Patrick, and to quitclaim any remaining interest in Pine Tree stock to Patrick. Paragraph (8) required Larry to hold the defendants harmless against any claims of Rutan & Tucker in the settlement proceeds and "all payments to Rutan &Tucker shall occur out of the sales of the Edna Property or out of the $10,000 per month payment after Hemming Morse [a]ccounting fees are paid." Paragraph (9) provided for the prevailing party to recover attorney fees in the event of a breach of any term of the judgment.

On November 22, 2011, Larry filed a motion to vacate the October 2011 judgment pursuant to section 663. He complained that paragraph 1(a) of the judgment improperly stated the monthly $10,000 payments on the $2.4 million Patrick owed him "shall be fully secured pursuant to a Memorandum of Security" when the oral agreement was that the payments would be "fully secured." Additionally, Larry urged "fully secured" meant there must be a promissory note for the $2.4 million secured by a deed of trust. He also complained the judgment lacked any default remedy or penalty provisions to ensure Patrick complied with the judgment. Although Patrick filed opposition, Larry has not included the opposition in the record on appeal. Hemming Morse also apparently filed a motion to vacate the October 2011 judgment, which also has not been included in the record on appeal.

The trial court ruled on Larry's and Hemming Morse's motions to vacate on February 10, 2012. As to Larry's motion, the court granted it in part to change paragraph (1)(a)'s reference to a "'Memorandum of Security'" to, "'The $10,000 payments shall be fully securitized[.]'" It rejected Larry's contention the judgment

should require the payments be secured by a deed of trust as there was no agreement that a deed of trust be used. The court also observed the judgment did not need to incorporate default provisions or penalty provisions as there was no evidence the parties had ever agreed to any such provisions and they were not required for the settlement agreement to be enforceable. The court granted Hemming Morse's motion and ordered the judgment as to payment of its accounting fees would be amended to accurately reflect the court's prior rulings.

On May 22, 2012, the trial court entered an amended final judgment (the May 2012 amended judgment). As relevant here, the May 2012 amended judgment changed paragraph (1)(a)(i) from "[t]he $10,000 payments shall be fully secured pursuant to a Memorandum of Security" to "[t]he $10,000 payments shall be fully securitized[.]" Paragraph (1)(b) was modified to add to the requirement that the Edna Property be conveyed to Larry and Larry must sell the property to satisfy amounts owing to Hemming Morse, details as to how such a sale would be conducted (i.e., escrows, use of a broker, order in which liens must be satisfied).[5] The May 2012 amended judgment added to paragraph (2)(b) the final amount of costs awarded to Patrick ($737,762.66) and expanded on paragraph (3)(a), confirming Patrick's continued liability for payment of

[5] Paragraph (1)(b) of the October 2011 judgment read, "The Edna Property will be conveyed to [Larry] free of liens and encumbrances with title insurance and taxes prorated and [Larry] shall sell the Edna Property to satisfy any liens and any amounts owing to Hemming Morse." Paragraph (1)(b) of the May 2012 amended judgment repeated the same language followed by five subparagraphs that provided: (1) once the Edna Property was conveyed to Larry, he would be holding it in trust for Patrick and Hemming Morse until the obligation to pay Hemming Morse's liens was satisfied; (2) Larry would cause the property to be sold promptly at fair market value using an independent third-party real estate broker; (3) Larry would give a potential buyer notice of the judgment; (4) once a sale contract was executed, escrow would be opened for the joint benefit of everyone concerned (i.e., Patrick, Larry, Hemming Morse, and Rutan & Tucker); and (5) specified the order in which proceeds from the Edna Property sale would be distributed (first Hemming Morse, then Patrick to reimburse him for Hemming Morse fees he had directly paid, then Patrick for costs he had been awarded; and any remaining proceeds to Larry).

Hemming Morse's accounting fees in the event proceeds from the sale of the Edna Property were insufficient. On August 10, 2012, Larry filed his notice of appeal designating his appeal as being from the May 2012 amended judgment.

DISCUSSION

Patrick contends Larry's appeal must be dismissed because it is untimely. We agree.

The original judgment was the October 2011 judgment entered on October 25, 2011. Larry was served with notice of entry of judgment on November 11, 2011. Larry was required to file a notice of appeal from the judgment within 60 days—January 10, 2012. (Cal. Rules of Court, rule 8.104(a)(1)(A).) Larry did not appeal, but on November 22, he filed a section 663 motion to vacate the October 25, 2011, final judgment. As relevant here, the motion to vacate extended Larry's time to appeal to the earliest of 30 days after the motion was denied or 180 days after entry of the judgment. (Cal. Rules of Court, rule 8.108(c).) The motion was denied in part on February 10, 2012, thus extending the time to appeal until March 11, 2012. Larry did not file a notice of appeal from the October 2011 judgment. The trial court entered the May 2012 amended judgment on May 22, 2012, and Larry filed his notice of appeal from that judgment on August 22, 2012.

Because the only arguably timely notice of appeal Larry filed was from the May 2012 amended judgment, we must determine whether that amended judgment revived Larry's opportunity to challenge on appeal the findings and judgment entered on October 25, 2011. If the appeal is untimely, we have no jurisdiction to consider it, and it must be dismissed. (Cal. Rules of Court, rule 8.104(b); *Estate of Hanley* (1943) 23 Cal.2d 120, 123.) The resolution of this issue turns on the question whether the May 2012 amended judgment superseded the October 2011 judgment for purposes of computing the time in which to file a notice of appeal. (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 504 (*Dakota Payphone*).)

The May 2012 amended judgment will begin a new appeal period only if it contains a substantial modification of the original judgment. To determine whether the modification effected by the amended judgment is substantial, we focus on the appellate claims made between the particular parties involved. As observed in *Dakota Payphone, supra,* 192 Cal.App.4th at pages 506-508, "The crux of the problem . . . is whether there is a substantial change in the rights of the parties such that allowing an amendment nunc pro tunc (relating back to the original judgment) would unfairly deprive them of the right to contest the issue on appeal or otherwise. . . . [I]t is ultimately the parties' ability to challenge the ruling that is key. The right we are concerned with materially affecting is the right to appeal."

Dakota Payphone, supra, 192 Cal.App.4th 493, is instructive. In that case, a default judgment was entered against defendant awarding plaintiff $45 million in compensatory damages, of which approximately $15 million was based upon defendant's fraud. (*Id.* at p. 499.) Defendant filed a motion for new trial that was granted in part with the trial court reducing the fraud damages by $4 million to reflect the amount set forth in the complaint and an amended judgment was entered. (*Ibid.*) Defendant appealed from the amended judgment claiming the default judgment was obtained through mistake and fraud. (*Id.* at p. 497.) In deciding whether defendant's appeal was timely, the appellate court considered whether the amended default judgment superseded the original judgment for purposes of computing the time to appeal. The court concluded it did not. Reducing the amount of damages awarded against appellants did not deprive him of his right to challenge the original judgment. Although the $4 million modification "appear[ed] to be substantial and to materially affect the rights of the parties[,]" in the context of protecting the parties' right to appeal it was not. (*Id.* at p. 509.) "Though the monetary positions of the litigants have been changed, in doing so the trial court did not deprive the parties of their ability to challenge any portion of the judgment. Rather, it merely altered their positions in the litigation to accord with the way things are required

to be by law. As with postjudgment orders filling in the blanks for attorney fees and interest . . . , any challenge to the modification itself could have been raised on appeal from the postjudgment order modifying the judgment. [Citations.] All other parts of the judgment not affected by the modification remained valid and could have been challenged by appeal." (*Ibid.*)

By contrast, in *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758 (*Sanchez*), the court concluded an amended judgment reducing plaintiff's award of past medical expenses by almost $73,000 to reflect his 30 percent comparative fault was held to be a substantial modification of the original judgment such that the time to appeal started anew. The court concluded the amended judgment contained a significant quantitative reduction in plaintiff's damages. And it "altered the rights of the parties because it implemented the trial court's conclusion that the award to [plaintiff] should be reduced to reflect his comparative fault. The comparative fault reduction in damages reflected a new legal ground (i.e., a new factor) not used to calculate the amount actually awarded. This new factor materially altered [plaintiff's] rights of recovery because it changed the formula used to calculate damages." (*Id.* at p. 767.) The merits of the appeal involved the amount of damages award, which were increased on appeal by approximately $5,000. (*Id.* at p. 769.)

In this case, Larry's appeal raises three issues: (1) He contends the oral settlement agreement is too uncertain to be unenforced; (2) he contends he lacked the mental capacity to understand and agree to the settlement agreement; and (3) the trial court erred by awarding Patrick attorney fees, accounting fees and costs resulting from Larry's breach of the settlement agreement. The May 2012 amended judgment made no substantial modifications to the October 2011 judgment regarding these issues—all were issues that were raised by the October 2011 judgment. "[I]f a party can obtain the desired relief from a judgment before it is amended, he must act -- appeal therefrom -- within the time allowed after its entry." (*George v. Bekins Van & Storage Co.* (1948)

83 Cal.App.2d 478, 481.) Larry makes much of the one modification he obtained as a result of his motion to vacate—changing the words "Memorandum of Security" to ""fully securitized." But that change was little more than correction of a clerical error, involving no exercise of judicial function to make the judgment comply with the express words of the oral settlement agreement, which were that the $10,000 monthly payment obligation would be "fully secured." (*Id.* at pp. 480-481.)[6] Larry also argues the expanded discussion of the sale of the Edna Property constitutes a substantial modification because having to use an independent broker, use an escrow account, or advise a buyer about the judgment might impact his ability to sell the property and the amount he realizes from such a sale. But those expanded directives did little more than put in express terms what was already implied in the underlying mandate that was identical in the October 2012 judgment and the May 2013 amended judgment that "[t]he Edna Property will be conveyed to [Larry] free of liens and encumbrances with title insurance and taxes prorated and [Larry] shall sell the Edna Property to satisfy any liens and any amounts owing to Hemming Morse." Neither of those changes affected Larry's right or ability to appeal the original judgment. Accordingly, as in *Dakota, supra*, 192 Cal.App.4th 493, Larry's attempted appeal from the May 2012 amended judgment was untimely and must be dismissed.

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[6] The trial court's use of the word "securitized" instead of "security" is of no moment. "Securitized" is a relatively new word used in the context of the modern practice of bundling mortgages and reselling shares in that bundle to investors. (See Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/securitize [securitize: transitive verb: to consolidate (as mortgage loans) and sell to other investors for resale to the public in the form of securities: first known use 1981].) But in the context of this case, which has absolutely nothing to do with that practice, where the trial court made clear in its order it was simply to make the judgment conform to the express words of the oral settlement agreement, it is obvious the use of the word "securitized" was meant to be "secured."

DISPOSITION

The appeal is dismissed. In the interests of justice the parties shall bear their own costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.